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CHARLES ELMORE CROPLEY
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IN THE

Supreme Court of the United States

No. 479, October, 1944, Term.

PUBLIC SERVICE COMMISSION, the same being the State Division of the Department of Public Service of the State of New York; CITY OF YONKERS; and JOHN W. TOOLEY, JR., as President of Committee of Yonkers Commuters, a voluntary unincorporated association, composed of more than eleven persons,

Appellants,

against

UNITED STATES OF AMERICA, THE NEW YORK CENTRAL RAILROAD COMPANY and INTERSTATE COMMERCE COMMISSION,

Appellees.

PETITION UNDER RULE 33 OF THE RULES OF THIS COURT AND MOTION FOR STAY OF MANDATE HEREIN.

John J. Broderick,
Corporation Counsel for Appellant, City of Yonkers.

Horace M. Gray,
Attorney for Appellant, John W. Tooley, Jr. as President, etc.

Pandick Press, Inc., 22 Thames St., New York 6, N. Y., U. S. A.

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Appellants,

against

United States of America, The New York Central Railroad Company and Interstate Commerce Commission,

Appellees.

PETITION UNDER RULE 33 OF THE RULES OF THIS COURT AND MOTION FOR STAY OF MANDATE HEREIN.

To the Honorable The Chief Justice and the Associate Justices of the Supreme Court of the United States:

The appellants, City of Yonkers and John W. Tooley, Jr., as President of Committee of Yonkers Commuters, hereby petition under Rule 33 of the Rules of this Court for a re-consideration of the appeal in this action and for other relief upon the following grounds:

FIRST: By reason of the action taken herein by this Court on or about the 13th day of November, 1944, these appellants have been denied and deprived of the right of appeal granted to them by statute to wit: §§47 and 47a of Title 28, United States Code.

SECOND: These appellants have thereby been deprived of their constitutional right to argue this appeal which is provided for in Rule 28, Paragraph 4, of the Rules of this Court.

THIRD: These appellants have thereby been deprived of an opportunity to file briefs in support of their appeal as provided for by Rule 27 of the Rules of this Court.

FOURTH: That this Court acted upon said appeal without any motion before it to dismiss or affirm as required by Rule 7, Paragraph 4; Rule 7, Paragraph 3; and Rule 12, Paragraph 3, of the Rules of this Court.

FIFTH: These appellants have thereby been deprived even of the right to a hearing upon the summary docket provided for by Rule 7, Paragraph 5; and Rule 28, Paragraph 6, of the Rules of this Court.

SIXTH: That this Court erroneously referred in its *per curiam* opinion handed down on November 13, 1944, to the subject matter of the prior appeal herein as being "on remand * * * to the Interstate Commerce Commission for further findings, * * *.", but, as a matter of fact, the order of this Court entered upon the appeal in the case of *City of Yonkers* v. *United States,* 320 U. S. 685, to which this Court referred, was an unqualified reversal of the decision of the Statutory Court appealed from which had

refused to vacate the order and certificate of the Interstate Commerce Commission dated March 20, 1943, granted upon the application of the New York Central Railroad Company; and this Court was without jurisdiction on the record to remand said Federal Court proceeding to the Interstate Commerce Commission for any action.

SEVENTH: These appellants have thereby been denied due process of law in the prosecution of their appeal as guaranteed to them by the Fifth Amendment to the Constitution of the United States.

EIGHTH: That the rights of the appellants under the Tenth Amendment to the Constitution of the United States have thereby been violated through the failure of this Court to vacate the certificate and order of the Interstate Commerce Commission dated February 25, 1944, permitting the abandonment of the Yonkers Branch spur which is located wholly within the State of New York and which is an interurban electric railway not operated as a part of a general steam railroad system of transportation; upon a record which fails to contain findings sufficient in law to support the order and which lacks evidence essential to support the findings made.

NINTH: The appellant, Tooley, has thereby been deprived of the right properly to present to this Court his assignment of error on this appeal disputing the qualification of the Interstate Commerce Commission to pass upon the application in suit by reason of personal interest of the individual members through their dependence upon President Roosevelt for nomination for reappointment to office as Interstate Commerce Commissioners upon the expirations of their current terms; and through the interference

by the Executive Department with the consideration by the Interstate Commerce Commission of the application in suit for the purpose of obtaining scrap steel alleged to be urgently needed by the Army; whereby these appellants were denied due process of law and their day in Court guaranteed to them by the Fifth Amendment to the Constitution of the United States.

WHEREFORE, these appellants request that the order of November 13, 1944, herein be vacated; that this appeal proceed according to law and the Rules of this Court; that the record be printed; that the appellants be granted an opportunity to file printed briefs in accordance with the Rules of this Court; that they be granted an opportunity for oral argument of this appeal in accordance with the Rules of this Court and that they be granted the hearing guaranteed to them by the acts of Congress and the Constitution of the United States; and hereby move that the mandate herein be stayed until the final disposition of this petition and that the time for the issuance of the mandate of this Court be enlarged to January 15, 1945.

December 6, 1944.

Respectfully submitted

JOHN J. BRODERICK,
Corporation Counsel for Appellant,
City of Yonkers.

HORACE M. GRAY,
Attorney for Appellant, John W. Tooley, Jr.,
as President, etc.

I hereby certify that I have examined the foregoing Petition and Motion, that in my opinion they are well founded and entitled to the favorable consideration of this Court and that they are presented in good faith and not for the purpose of delay.

JOHN J. BRODERICK,
Corporation Counsel for
City of Yonkers.

I hereby certify that I have examined the foregoing Petition and Motion, that in my opinion they are well founded and entitled to the favorable consideration of this Court and that they are presented in good faith and not for the purpose of delay.

HORACE M. GRAY,
Attorney for John W. Tooley, Jr.,
as President, etc.

Additional Certificate.

STATE OF NEW YORK
COUNTY OF WESTCHESTER } ss.:
CITY OF YONKERS

JOHN J. BRODERICK, being duly sworn, deposes and says: that he is the attorney for the Appellant City of Yonkers in this case.

That in this case there are substantial questions of law and fact and jurisdictional questions based on law and fact.

That the Plaintiffs (now appellants) in the Court below pray that the District Court enjoin, set aside, annul and suspend the order and certificate of the Interstate Commerce Commission dated February 25, 1944, in a proceeding designated as Finance Docket 13914 permitting the New York Central Railroad Company to abandon a portion of its so-called Yonkers Branch for a distance of about approximately 3.1 miles, all within the State of New York.

That this case was duly heard by the Statutory Court below and on or about the 17th day of July, 1944 a Judgment was made and entered denying the plaintiffs' application for a final injunction and dismissing the petition of the plaintiffs.

That we believe as a matter of right because of the nature of this action, the Appellants herein are entitled to appeal on the merits by reason of the provisions of Sections 47 and 47(a) of Title 28 of United States Code.

That in accordance with the provisions of said Sections 47 and 47(a), an appeal from said Judgment was applied for on the 11th day of August, 1944, within thirty days after the said Judgment was made and entered.

That Section 47 of Title 28 of United States Code provides:

> *"An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction, in such case if such appeal be taken within thirty days after the order, in respect to which complaint is made, is granted or refused; and upon the*

final hearing of any suit brought to suspend or set aside, in whole or in part, any order of said commission the same requirement as to judges and the same procedure as to expedition and appeal shall apply." (Italics ours.)

See *Stafford* v. *Wallace*, 258 U. S. 495.

That in addition, when the original case was before the Federal Supreme Court in *City of Yonkers* v. *United States*, 320 U. S. 685, this statement was made in the prevailing opinion of Mr. Justice Douglas:

> "The Commission itself has noted that in the 'construction of these exclusion clauses great difficulty has been experienced, particularly in determining the roads properly classifiable as interurban electric railways.' Annual Report (1928), p. 80. That difficulty is apparent here by the division of opinion which exists in the Court whether this Yonkers branch is an 'interurban electric' railway which is 'operated as a part' of the New York Central system. Sec. 1 (22)."

That this question of jurisdiction is still open notwithstanding the Findings of Fact approved by the Court below.

That because of the importance of the subject involved on the two jurisdictional questions raised, viz., the right to appeal and second the jurisdiction of the Interstate Commerce Commission, your deponent believes that an opportunity should be given to the Appellants to present a printed Case on Appeal and have oral argument on the same.

Your deponent makes this application in good faith and not for the purpose of delay.

JOHN J. BRODERICK.

Sworn to before me this
6th day of December, 1944.

MARGARET V. WALSH,
City of Yonkers, N. Y.
Notary Public, Westchester County.